# DISPARAGEMENT OF PROPERTY.

## II.

### Actual Damage.

The third common requisite to be proved by the plaintiff in an action for disparagement of title, both as against a stranger and as against a rival claimant, is: That defendant's disparaging statement has been the cause of actual damage to the plaintiff.[1]

This involves two points to be made out by plaintiff.

First: That plaintiff has suffered actual damage.

Second: That such damage was "caused," in the legal sense, by defendant's statement.

An intelligent layman may wonder why any adjective should be prefixed to damage. He may ask how there can be any damage recognized by law unless it be actual. The word "actual" is here prefixed to distinguish the case from those where "nominal" damage is said to be sufficient; the real meaning there being that no damage at all is required to be proved. Actual damage is here used in the sense of real, appreciable damage, in antithesis to fiction damage described by the term "nominal."[2]

The plaintiff's burden of proving actual damage is not lightened by any "presumption," or by any arbitrary rule of law. Damage must be found as a fact in all cases of disparaging statements, whether oral or written. There is nothing answering to the distinction in defamation between libel and slander; or between oral statements which are actionable *per se* and those which are not so classed, in reference to the necessity of proving damage.[3]

There has been a tendency in some courts to take an unduly

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[1]There is a general consensus of authority in support of this position. A late decision is Hygienic &c. Co. *v.* Way (1908) 35 Pa. Sup. 229. For an erroneous *dictum* that nominal damage would suffice, see Butts *v.* Long (1902) 94 Mo. App. 687, 696.

[2]As to reasons for preferring the expression "actual damage" to "special damage", the term heretofore commonly used, see Bower, Code of the Law of Actionable Defamation, 33 note (p); and Bowen *L. J.*, in Ratcliffe *v.* Evans L. R. (1892) 2 Q. B. 524, 528-529.

[3]"And we are of opinion that the necessity for an allegation of actual damage, in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print; but that it rests on the nature of the action itself, namely, that is an action for special damage actually sustained, and not an action for slander." Tindal *C. J.*, in Malachy *v.* Soper (1836) 3 Bing. N. C. 371, 385-386.

restricted view as to the damages recoverable in an action for disparagement of title. This tendency is due, not only to the habit of laying down a narrow definition of causation in reference to torts in general, but also to an inclination to discourage (or, at least, to make it difficult to maintain) actions for disparagement of property. The attitude of some courts towards this class of actions reminds one of the common judicial attitude towards actions for malicious prosecution.

What kinds of damage does the law recognize as sufficient to maintain this action? What sort of loss or harm is allowed to constitute a basis for recovery?

The most frequent ground for recovery is the loss of a chance to sell or lease the property, the title to which is disparaged. But this is not the only instance where recovery is allowed.[4] In the early case of *Newman* v. *Zachary*,[5] the false statement, instead of preventing a sale of plaintiff's animal, caused its seizure as an estray. Plaintiff recovered for the damage occasioned to him by the seizure.

There is a conflict of authority upon the question, whether the plaintiff can recover the expense of legal proceedings to remove a cloud upon his title, occasioned by defendant's disparaging statement.[6] There seems no good reason for denying such recovery, even in a court which adopts as its test of causative relation the narrow rule confining recovery to probable consequences. The creation of a cloud upon the title, is, in the great majority of cases, a consequence reasonably to be anticipated from the making of the disparaging statement.

It has been said that depreciation in the value of property, meaning a lessening of its value in the opinion of other people, will not constitute a ground for the recovery of damages.[7] On principle, it seems that the recovery of damages ought not to be rigidly confined to the loss of a definite chance to sell or lease. Cases can be imagined where the disparaging statement would

[4]See Townshend, Slander and Libel (4th ed.) § 206 *b*; 25 Am. & Eng. Encyl. Law (2nd ed.) 1079.

[5](1671) Aleyn 3.

[6]Recovery was allowed in Chesebro *v.* Powers (1889) 78 Mich. 472; and see also Elborow *v.* Allen (1623) Cro. Jac. 642. Recovery was denied in Cohen *v.* Minzesheimer (1909) 118 N. Y. Supp. 385; and see also Cormier *v.* Bourque (1894) 32 New Brunswick 283; Gwynne *J.*, in Ashford *v.* Choate (1870) 20 Upper Canada C. P. 471, 474; McGuinness *v.* Hargiss (1909) 56 Wash. 162.

[7]See Barrett, *J.*, in Bonanza Development Co. *v.* Hayes (N. Y. 1883) 5 Monthly Law Bulletin 28.

render the property absolutely unsalable so that it would be idle to offer it in the market. Should the owner be denied remedy, unless he can prove that some particular person was negotiating for the purchase at the time of the defendant's statement and that such person broke off the negotiation in consequence of the statement? Courts, however, are influenced by the fear, which is not altogether groundless, that speculative and frivolous claims will be put forward, unless the rule as to recoverable damage is confined within narrow and definite limits.

Of course, it is not enough to show merely that the plaintiff has suffered damage. It must always appear that such damage was "caused" in the legal sense, by the defendant's statements. The damage must be a product of the disparagement. "To sustain a suit, the two must be cause and effect."[8] Thus, the defendant may have denied the plaintiff's title, and a prospective tenant may have failed to lease the property, but there can be no action for the loss of the chance to let unless it also appears that the failure of the proposed tenant to take the lease was due to the defendant's statement.[9]

How distinctly must the causal connection be traced? How fully must it be proved?

There has been at times a tendency to demand almost "certainty" of proof. But there is no good reason for establishing an exceptional rule in this class of cases. Whatever definition of causation is adopted by any court, the question of fact, whether the requisite conditions exist in the case in hand, should be decided upon the balance of probabilities; just the same as the decision of any other material issue of fact arising upon any other branch of the case. The sound views enunciated by Bowen, *L. J.*, in Ratcliffe *v.* Evans, are likely to prevail.[10]

A question as to the form of declaration has occasioned some discussion. If the plaintiff seeks to recover for the loss of a chance to sell, is it necessary to set out in the declaration the names of the persons who were prevented, by the defendant's disparaging statement, from purchasing the property?

The correct rule, and one which will reconcile most, and perhaps all of the cases, seems to be this: The declaration must set

[8]Compare Bishop, Non-Contract Law §37

[9]Fleming *v.* McDonald (1911) 230 Pa. St. 75. And see an English case of disparagement of quality, where the failure to lease was earlier than the making of defendant's statement, and hence not attributable to it. Barrett *v.* Associated Newspapers (1907) 23 Times L. Rep. 666.

[10]L. R. [1892] 2 Q. B. 524, 532-533; see Pollock, Torts (6th ed.) 302.

out the names of the prospective purchasers, unless it alleges that, under the circumstances, it is not reasonably practicable for the plaintiff to ascertain the names. Where the latter allegation was lacking, declarations have been held defective for want of the names.[11]

But suppose that the plaintiff advertised a sale at auction; that defendant at the auction asserted his own title and disputed the plaintiff's title; that a crowd which had gathered thereupon dispersed; and that no sale was effected. Upon this evidence a jury might well find that some persons in the crowd would have bid but for defendant's statement. And yet it would often be impracticable for plaintiff to give the names of such prospective purchasers. In such a case it is rightly held that plaintiff's failure to allege the names does not bar his remedy.[12]

What is the general test of legal cause (the legal definition of causation) to be applied in determining whether the disparagement of title "caused" the damage suffered by the plaintiff? The obvious answer is: The same test as in other actions of tort, whatever that may be. Unfortunately, however, the test in actions of tort is not a matter as to which there is, at the present time, unanimity of opinion. Indeed, it is one of the most unsettled topics in the law.[13] Confusion has resulted from the way the subject has been dealt with by some able writers. An author lays down, as furnishing the specific test of causal connection in disparagement cases, the particular theory of legal cause which he happens to hold. And there is generally no intimation that there is any doubt or any conflict of authority as to the correctness of the particular theory thus stated. But those readers who consider

[11]See Wilson *v.* Dubois (1886) 35 Minn. 471; Linden *v.* Graham (N. Y. 1853) 1 Duer 670; Stevenson *v.* Love (1901) 106 Fed. 466; 25 Am. and Eng. Encyc. Law (2nd ed.) 1080. See also Manning *v.* Avery (1673) 3 Keble 153; Tasburgh *v.* Day (1619) Cro. Jac. 484.

[12]Hargrave *v.* LeBreton (1769) 4 Burrows 2422; Roche *v.* Meyler L. R. [1895] 2 Ir. 35. In the latter case, the court ordered plaintiff to furnish "the best particulars she can give of the persons who were desirous of purchasing and were prevented by reason of the words complained of." Johnson, *J*, said, p. 36: "If the plaintiff here does not know the names of the persons who were prevented from purchasing, he will not be prejudiced."

In a case where plaintiff alleges that defendant falsely stated that plaintiff's business had been discontinued, and that hence plaintiff had suffered a loss of custom, plaintiff has been allowed to recover, without being obliged to give the names of the particular persons whose custom he has thus lost. Ratcliffe *v.* Evans L. R. [1892] 2 Q. B. 524. Compare Wright *v.* Coules (1906) 4 Cal. Ap. 343; 87 Pac. 809; *s. c.* 3 Cal. Ap. 283 (edition by R. V. Whiting).

[13]See 25 Harv. L. Rev. 105.

the causation theory of any particular author as erroneous are not likely to accept all results arrived at by the author's application of that theory to actions for disparagement of property.[14]

While no attempt is made here to discuss the general subject of causative connection, it seems desirable to advert briefly to some special points, which occasionally arise in actions for disparagement of property.

1. In actions for defamation of reputation it is held that the original utterer of the charge (if he neither intended nor authorized repetition) cannot be liable for special damage which is immediately due to repetition by the original addressee (or by some other person). This doctrine is supported solely by authority: being totally indefensible upon principle.[15] There is no reason why this erroneous doctrine in the law of defamation should be imported from thence into the law as to disparagement of property.

2. It is conceded that a defendant, who makes a statement disparaging plaintiff's title, may be liable when his statement prevents the making of a contract. But it is sometimes contended that he is not liable when his statement prevents a contracting party from carrying out (performing) a valid contract which he had previously entered into with the plaintiff. Suppose that C has made a valid contract to purchase property of A; that B then falsely tells C that A's title is defective; and that this statement causes C to refuse to perform his contract. If A sues B for disparagement of title, can he recover against B for damage caused to A by C's non-fulfillment of his contract? Upon this question there is a conflict of authority.

[14]Mr. Odgers says that the special damage "must be either the natural and necessary result of the defendant's words, or a result which the defendant in fact contemplated and desired." Odgers, Libel and Slander (5th ed.) 78-79. But, even on a restricted view of causative connection, the words "and necessary" cannot be justified. See Watson, Damages for Personal Injuries § 36.

Mr. Bower says that the plaintiff must prove that the damage "was either the natural and probable result thereof" (*i. e.* of the publication), "or the result which the defendant had in fact intended." Bower, Code, 243. But it is an open question whether liability for unintended consequences should be limited to those results which a reasonable man might have specifically foreseen. Mr. Beven, in England, and Prof. Bohlen, in this country, both emphatically reject the alleged rule of non-liability for improbable consequences; and, instead, assert that a wrong-doer may sometimes be held for consequences which were neither intended nor specifically foreseeable. See Beven, Negligence (3rd ed.) 88-90; Prof. Bohlen, in 40 Am. L. Reg. N. S. 79, 148, and in 41 Am. L. Reg. N. S. 141, 147-149; 1 Street Foundations of Legal Liability, 111, 116, 451; 1 Sedgwick, Damages (9th ed.) 111*c* and 111*e*.

[15]See references in 25 Harv. L. Rev. 123, note 69.

It is urged, as one argument against recovery, that the fact that A has a remedy against C (by an action for breach of contract) constitutes a sufficient reason for denying A any remedy against B.

This position is untenable.

"Where it is a question whether A has been injured by B, it is wholly immaterial whether he has or has not an additional or alternative remedy against C and * * * it can never lie in the mouth of a wrongdoer, if he *is* a wrongdoer, to set this up."[16]

It cannot be said that A's situation has not been altered for the worse by B's misstatement. If B's statement had never been made, A would *ex hypothesi,* have enjoyed without delay or expense, the benefit of C's performance of his contract. But now, in consequence of B's statement, A loses all benefit from the contract, unless he elects to undergo the delay, harassment and expense of litigation with C. And even if A prevails in such litigation, yet the taxable costs recovered by him are likely to fall far short of covering his legal expenses.

Another ground for denying recovery in such a case is based upon an alleged arbitrary rule, or "conclusive presumption" of law. It is contended that the subsequent voluntary unlawful act of C (C's breaking his contract) *cannot in law* be deemed the consequence of the earlier tort of B (*i. e.,* B's untrue statement to C). It is said that the law invariably implies in every case that the voluntary unlawful act of a later actor is not the natural and probable result of a tort committed by an earlier actor. A short answer to this position is: that, if the law is so to imply in every case, "it will be an implication contrary to manifest truth and fact."[17]

This last argument in behalf of B is really founded on the language in *Vicars* v. *Wilcocks,*[18] which has been disapproved by the highest modern authority.[19] Fallacious though the argument is, it has, however, been indorsed in several States.[20]

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[16]Bower, Code, 315.

[17]See Brett, L. J., and Lord Chancellor Selborne in Bowen *v.* Hall (1881) L. R. 6 Q. B. Div. 333, 338, 339.

[18](1806) 8 East 1.

[19]See 25 Harv. L. Rev. 119-122; Bower, Code of the Law of Actionable Defamation, 313-315, and 39, note (*d*).

[20]Kendall *v.* Stone (1851) 5 N. Y. 14, 20; Brentman *v.* Note (1889) 3 N. Y. Supp. 420; Cohen *v.* Minzesheimer (1909) 118 N. Y. Supp. 385; Felt *v.* Germania Life Ins. Co. (1912) 133 N. Y. Supp. 519; Walkley *v.* Bostwick (1882) 49 Mich. 374; Burkett *v.* Griffith (1891) 90 Cal. 532.

The correct doctrine on this point is sustained in Ashford *v.* Choate (1870) 20 Upper Canada C. P. 471. See also Green *v.* Button (1835) 2 Cr. M. & R. 707; and Townshend, Slander & Libel (4th ed.) § 206.

3. Suppose that C enters into an oral contract with A for the purchase of property, where the Statute of Frauds requires that the agreement, in order to be enforceable by suit, must be in writing. Suppose that C would have performed his agreement if B had not made an untrue statement disparaging A's title; but that B's statement caused C to refuse to perform. Can A recover against B for thus causing C to refuse to perform an agreement, which C could not have been compelled to perform, but which C would nevertheless have performed but for B's statement?

A can recover against B.[21]

Having thus stated the specific requisites to an action for disparagement of title, we are now in a position to take a general view of the nature of the plaintiff's right and the method of its infringement; and also to consider questions of analogy, classification and nomenclature.

The right in the plaintiff which is infringed is not a right to personal reputation, but a right in connection with property.[22] The method of its violation is not direct physical invasion, not the application of physical force to the tangible object of property; but the use of language, oral or written, which is likely to and does depreciate the value of property in the hands of the owner. The tangible object (*e. g.*, a chattel), which is the subject of plaintiff's alleged right of ownership, is not physically affected by defendant's statements. It is the minds and conduct of third persons, intending purchasers and the like, upon which the statement produces an effect. And the ultimate result is to affect the value of the chattel in the hands of its alleged owner. The intrinsic value of the chattel has not been altered; but rather its salable value. It has in this respect been rendered less valuable to the owner.[23]

The right in the plaintiff which is infringed, is the right to hold property unimpaired in value (free from depreciation in value) by untrue statements concerning the title of the owner.[24] Such a right exists in plaintiff as against persons in general. But

[21]Rice *v.* Manley (1876) 66 N. Y. 82.

[22]A defendant's statement may be of such a character as to constitute not only a disparagement of plaintiff's property but also a defamation of plaintiff's reputation. Odgers, Libel and Slander (5th ed.) 34-38; Bower, Code, 16 and 240, note (*y*). The requisites to an action for defamation are much less stringent than the requisites to an action for disparagement of property.

[23]See Casey *v.* Arnott (1876) L. R. 2 C. P. Div. 24; Grove, *J.*, 25.

[24]See Innes, Torts § 209, 190.

his right as against professed rival claimants is much more limited; his right against the latter is a right to hold property unimpaired in value by statements which are not believed by the maker, or which are made from wrong motive.

Is disparagement of title a distinct kind of tort; or is it a mere branch or variety of the action for defamation, or of the action for deceit?

As to this various opinions have been expressed:

"There are some cases holding that it is not an action for slander, but in reality an action on the case for maliciously acting in such a way as to cause the plaintiff some pecuniary loss. But it seems to be an attempt to set up a far-fetched distinction without any material difference. It is better reason to call it an action for slander and for special damage resulting therefrom. * * * The words then belong to that class of defamatory words actionable with proof of special damage."[25]

"The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by defendant's falsehood to act in a manner causing damage to the plaintiff."[26]

"Slander of title is usually treated of under the head of defamation; but it seems rather to be a kind of fraudulent misrepresentation."[27]

Slander of title is more like an action for false representation than an action for defamation of character.[28]

The name Slander of Title is "somewhat misleading."[29]

"An action for words spoken concerning a thing is in some respects like an action for slander and in others like an action for malicious prosecution."[30]

"* * * the wrongs under consideration lie half way between libel and slander and malicious prosecution; and, in many respects, approach wrongs of fraud."[31]

In its general features, disparagement of title bears a resemblance to both deceit and defamation, and yet differs from each.

[25]Newell, Slander and Libel (2nd ed.) 204.

[26]Pollock, Torts (6th ed.) 301-302.

[27]Terry, Leading Principles of Anglo-American Law, 471.

[28](Substance) Bigelow, Leading Cases on Torts, 54.

[29](Substance) Bishop, Non-Contract Law § 345.

[30]Fell, *J.*, in Young *v.* Geiske (1904) 209 Pa. St. 515, 519.

[31]1 Jaggard, Torts, 551.

Mr. Salmond has compared the three in a general way in his discussion of "Injurious Falsehood."[32] In all three, there is a statement made by the defendant which is not true in fact. In deceit, the statement is made to the plaintiff, and the damage complained of results immediately from the plaintiff's own conduct in acting upon the statement. He is induced by the statement to act to his own pecuniary loss.[33] In defamation, the statement is made to third persons, and concerns the plaintiff's reputation. Plaintiff is supposed to suffer damage because his reputation is thus impaired in the minds of third persons, and sometimes because these persons are thus induced to act in a manner prejudicial to plaintiff's interest. In disparagement of title, the statement is made to third persons; but it does not concern plaintiff's reputation. It relates to his property interests. Third persons are thereby induced to act in such a manner that plaintiff suffers a pecuniary loss.

We now proceed to consider more specifically the resemblance and differences between an action for disparagement of title, and (1) an action for deceit, and (2) an action for defamation. (It must constantly be borne in mind that the requisites to an action for disparagement against a *stranger* differ very materially from the requisites to an action against a *rival claimant*).

In an action for deceit, the burden is on the plaintiff to prove that defendant's statement is not true in fact; and also (by the great weight of authority) to prove actual damage. Both these requirements are the same in an action for disparagement of title.

In deceit, by the modern English rule (not universally adopted in the U. S.), plaintiff must prove that defendant did not believe his statement. In disparagement such proof is not requisite to recovery against a stranger; but may often be essential to recovery against a rival claimant.

In deceit, proof of defendant's wrong motive (as distinguished from his intention) is not essential. In disparagement, such proof is not essential to an action against a stranger, but may sometimes be essential to an action against a rival claimant.

In deceit, it is essential to prove that defendant intended, or expected, or (at the least) ought to have foreseen, that plaintiff would act in reliance on the statement. We think that, in disparagement,

[32]See Salmond, Torts (1st ed.) 426 and 417.

[33]The word "deceit" as used in common speech would include a much larger class of cases. We are here giving the restricted meaning attached to the expression in the law of torts, in stating the requisites to an action for deceit.

it is not essential to prove either such intent, or expectation, or reasonable ground for such expectation.

In an action for defamation of reputation, the plaintiff, in order to make out a *prima facie* case, need not prove the untruth of the statement. In disparagement the contrary rule prevails.

In an action for defamation, actual damage need not be proved in certain cases (*viz.*, written defamation, amounting to libel; and oral charges that are actionable *per se*). In disparagement actual damage must be proved in all cases.

In an action for defamation, the burden is on the defendant, if he sets up the defense of conditional privilege, to show that the occasion was (conditionally) privileged. In disparagement the burden is, in effect, upon the plaintiff to show that the occasion was not (conditionally) privileged (*e. g.*, to show that the defendant did not profess to be asserting a claim in his own behalf).

In defamation, proof of actual wrong motive (*alias* "malice in fact") is not requisite to making out a *prima facie* case. In disparagement, such proof is not requisite as against a stranger. It may, however, be essential as against a rival claimant.

In defamation, there is some conflict of authority upon the question whether the plaintiff can rebut the defense of conditional privilege by proving want of reasonable ground for defendant's belief in his statement.[34] In disparagement it is settled law that the plaintiff cannot rebut the defence of privilege (set up by a rival claimant) by proving want of reasonable ground for defendant's belief.

An action for defamation does not, at common law, survive. It is terminable by the death of either party. An action for disparagement of property survives.[35]

In a declaration for defamation, it is held necessary to set out the exact words used; and not merely to state their purport or effect. The same particularity has been held necessary in a declaration for disparagement.[36]

The above comparisons justify the conclusion that disparagement of title is not a mere branch or variety of either defamation or deceit. Professor Bigelow was right in saying, that "slander

[34]See *ante* 13 COLUMBIA LAW REVIEW 33, 34 note 60.

[35]Hatchard *v.* Mege (1887) 18 Q. B. Div. 771.

[36]Gutsole *v.* Mathers (1836) 1 M. & W. 495. The question may be asked, why should an allegation of the precise words be required in an action for disparagement when it is held sufficient in an action for deceit to give the substance of the defendant's language. See argument, *Ibid.* 498.

of title" (as he terms it) has "a place of its own in the law of torts."[37]

Assuming disparagement of property to constitute a distinct tort, under what general head or title should it be classified; with what other torts should it be grouped?

A very broad classification would bring it into the same class with deceit and defamation. Under what head should it be classified, if it is *not* to be placed in the same group with deceit or defamation?

Several heads or titles may be suggested.

"Verbal Injuries."

This expression, taken literally, would exclude written disparagement; and would include oral statements defamatory of personal reputation.

"Malicious Words."

"Malicious" is too ambiguous a term to mark a class (to define the limit of a tort). Moreover, if it is taken as implying actual wrong motive, that is not an essential requisite to an action of disparagement against a stranger.

"Actions on the Case for Words which cause Damage."

This is the title of Chapter IV in the fifth edition of Odgers on Slander and Libel. The learned author explains that he does not, by this general language, mean to include words defamatory of personal reputation. But the title, taken literally and not in connection with the preceding chapters, would be understood as including such words, and might be construed as including also deceit.

"An action on the Case for special Damage sustained by Reason of Words, other than those defamatory of Reputation."

This again might include deceit.

There is a further and very serious objection to both the last titles. The form of remedy allowed by law should not be given as one of the distinguishing characteristics of a substantive tort. It is time to discard the habit of describing and classifying torts according to the names of remedies (the forms of action). Instead,

[37] Bigelow on Torts (7th ed.) § 180. In 28 Law Q. Rev. 297 at the end of a learned contributor's discussion as to whether "Trust" ought to be placed under the law of property or under the law of obligations, Sir Frederick Pollock appends the inquiry: "Why is Trust not entitled to rank as a head *sui generis?*"

they should be described and classified according to the essential nature of the right violated or of the wrong inflicted.[38]

"Injurious Falsehood, other than such Statements as amount to Defamation or Deceit."

This is suggested by the discussion in Salmond on Torts.[39] With some verbal alterations, this title seems preferable to the others discussed above.

It might be changed so as to read: "Statements not true in Fact and causing Damage; other than such Statements as amount to Defamation or Deceit."

This would include in the same general group some torts besides disparagement of property.[40]

So far as to Disparagement of Title.

Now as to Disparagement of Quality; *i. e.*, statements, the effect of which is "to depreciate or disparage the merits, utility, qualities, or value of any person's property."[41]

The law upon this subject did not begin to take form or shape until after the law as to disparagement of title had become tolerably settled.[42] In many respects the law on the two subjects is substantially the same. To make out a *prima facie* case for disparagement of quality, the plaintiff must, at least, prove the three propositions enumerated *ante* under disparagement of title: *viz.*, the publication of the statement, its untruth, and the infliction of actual damage.[43] It is now proposed to consider three questions which arise under actions for disparagement of quality.

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[38]See Maine, Early Law and Custom (Edition of 1891) 389; Maitland, Equity and Forms of Action, 372, 375; Preface to Green's Abridged Edition of Addison, Torts.

[39](1st ed.) 426 (and see 417).

[40]See Odgers, Libel and Slander (5th ed.) 77-79, 105-108; Bower, Code of the Law of Actionable Defamation, 238-9.

[41]See Bower, Code of the Law of Actionable Defamation, 242. As to disparagement of the quality of land by stating that there was but little iron-ore in the tract, see Paull *v.* Halferty (1869) 63 Pa. St. 46.

[42]In 1862, Cockburn, *C. J.*, said: "None of us are familiar with such actions." Young *v.* Macrae (1862) 3 B. & S. 264, 269.

[43]It should be noticed here that in an action for disparagement of quality a particular defense may sometimes be available which would not ordinarily be open to one sued for disparagement of title. If, for example, the disparaging statement relates to the "Quality" or genuineness of a picture or a statue which is on public exhibition, the defendant may contend that his remarks do not exceed the limits of that "fair comment" which the law allows upon subjects of public interest. In Gott *v.* Pulsifer (1877) 122 Mass. 235, the court seems to have regarded the defense as founded on the right of fair comment.

1. As to the non-liability of a rival for disparagement by comparison.

2. As to whether actual wrong motive (often termed "malice") is essential to make out a *prima facie* case.

3. As to whether a competing trader, pointing out alleged positive defects in his rival's goods, is to be regarded as occupying a *prima facie* privileged position (as speaking upon a *prima facie* privileged occasion); and hence not liable unless plaintiff proves his want of belief or wrong motive.

First: As to the non-liability of a rival for disparagement by comparison; *viz.*, where a rival trader simply asserts that his goods are superior to his competitor's; or, what is the same thing, that the competitor's goods are inferior to the speaker's. The law is accurately stated by Mr. Bower: "* * * the mere assertion by any person that any manufacture or invention of his own, or any class of goods in which he deals, or other like property, is superior to that of all other persons, or of any particular person, does not of itself constitute disparagement," (*i. e.*, actionable disparagement).[44] "* * * Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; * * * but that is a disparagement of which the law takes no cognizance."[45] And it is generally understood that no liability is incurred by such a comparison, even though the defendant rival did not believe what he said, or said it from a wrong motive.[46]

There is no action where a trader confines himself to asserting: (1) that his goods are better than the goods of any other person ("the best in the market"); or (2) that his goods are better than those of a specified person; or (3) that his goods are better in some particular respect than the goods of a specified person.[47]

If, however, a trader, while professing merely to compare his

[44]Bower, Code, 242, Article 61 (2).

[45]Lord Watson, in White *v.* Mellin L. R. [1895] App. Ca. 154, 167.

[46]See Odgers (5th ed.) 89, 92; Pollock, Torts (6th ed.) 304; Salmond, Torts (1st ed.) 428; Lindley, *L. J.*, in Hubbuck *v.* Wilkinson L. R. [1899] 1 Q. B. 86, 92-93; 25 Am. & Eng. Encyc. of Law (2nd ed.) 1076; Clerk & Lindsell, Torts (2nd ed.) 553. But see Lord Shand, in White *v.* Mellin L. R. [1895] App. Ca. 154, 171.

[47]"If an action will not lie because a man says that his goods are better than his neighbor's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect." Lord Herschell, in White *v.* Mellin L. R. [1895] App. Ca. 154, 165. See also Lord Lindley, in Hubbuck *v.* Wilkinson L. R. [1899] 1 Q. B. 86, 92-93.

own goods with his rival's, makes "a definite statement" as to the "positive, not merely comparative, defects" in his rival's goods, then such statement is *prima facie* actionable.[48] Thus, if A simply says: "My Soothing Syrup is better than B's," this statement is not actionable, although it was not true and A knew it was not. But suppose that A says: "My Syrup is better than B's Syrup, because there is opium in B's Syrup." If there is in fact no opium in B's Syrup, and damage follows upon this statement, then A is at least *prima facie* liable.[49]

Why this arbitrary rule of non-liability of a rival for disparagement by comparison?

It is based upon the general opinion of the community (shared by the judges) that statements by a trader vaunting the superiority of his own goods are not likely to influence the conduct of possible customers, and hence will very seldom work damage to a rival. A similar reason is given for disallowing an action for deceit by a vendee against a vendor who has indulged in exaggerated, but very general, commendation of his wares. This kind of "seller's talk," it is generally understood, is not to be trusted, and hence is seldom relied upon. *Simplex commendatio non nocet.* Indeed the seller's reason for making such statements is often, not because he expects customers to rely upon them, but because he fears that an inference might be drawn from his failure to indulge in the usual exaggeration.[50]

It is probably true that statements by rivals in the nature of disparaging comparisons are in rare instances relied upon by the

[48]See Bower, 242, note (*c*).

[49]See Odgers (5th ed.) 89; Salmond, Torts (1st ed.) 428; Lord Shand, in White *v.* Mellin L. R. [1895] App. Ca. 154, 170.

[50]It is sometimes said that an action of deceit for this class of representations is barred because it was the plaintiff's folly to give credit to such assertions. But we think that the plaintiff's folly cannot be regarded as constituting in itself a distinct ground of defence. There is some conflict in the authorities on this point; but it seems very clear on principle. The negligence of a plaintiff, if admitted to exist, might furnish a defence to an action for *negligence;* but not to an action for the defendant's *intentional tort.* Moreover, the plaintiff can hardly be said to be "negligent" towards the defendant. The defrauded party does not owe to the party who attempted to defraud him "a duty to use diligence to discover the fraud." Undoubtedly, the fact that it would generally be foolish to rely on such a representation is a circumstance which would have great weight in inducing a jury to find that a plaintiff did not in fact rely upon it. And it has also induced courts to adopt a hard and fast rule whereby plaintiffs are regarded as never relying, and hence are denied an action of deceit upon such representation. The ordinary presumption of fact—that plaintiffs do not rely—has hardened into an arbitrary rule of law. But the folly of the plaintiff in relying does not *per se* constitute a substantive defence to an action for deceit.

persons to whom they are addressed; and that the establishment of a sweeping general rule denying recovery for any statements of this description would work injustice in a few exceptional cases. But to allow an action for such statements would probably result in the bringing of numerous suits where there was no real foundation in fact for the allegation that the conduct of the addressee was actually influenced by this sort of "seller's talk." More harm than good would be done by permitting the action.

A further objection to the allowance of such actions was stated by Lord Herschell, in *White* v. *Mellin*,[51] "* * * the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better." Indeed, Mr. Salmond bases the rule excluding such actions wholly on the last mentioned consideration; saying, "This is a special exception to the general rule of liability for injurious falsehood—an exception established to prevent traders from using litigation as a means of advertisement."[52] While we do not concur in thinking this the sole reason for denying the action, yet it is one which has had great influence with the courts.

It is sometimes a very close question whether a disparaging statement should be construed as confined to comparison, or should be regarded as pointing out positive defects.[53]

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[51]L. R. [1895] App. Ca. 154, 165.

[52]Salmond, Torts (1st ed.) 428.

[53]Some instances where the statement was regarded as confined to comparison, and hence not actionable:

In Young *v.* Macrae (1862)3 B. & S. 264, the defendant had published the report of an expert, comparing the paraffine oil sold by defendant with that sold by plaintiff. The report states that defendants' oil is "a colorless and somewhat aromatic liquid," while plaintiff's oil "has a reddish brown tinge, is much thicker, and has a more disagreeable odor" than defendant's oil. It also states, in substance, that the lasting power of the light produced by plaintiff's oil is inferior to defendants'. Wightman, *J.*, 270: Defendants do not state that plaintiff's oil "is a bad article; it is only said that it is inferior to that of some one else; and that is consistent with the plaintiff's article being in itself a very good artcle. * * *" Cockburn, *C. J.*, p. 269-270: "But it may be that all the falsehood consists in this, that the defendant has alleged what is true of the plaintiff's oil and what is false of that of some other man, by attributing to that other man's oil a character of superiority which it does not deserve. If the declaration had averred that the defendant falsely represented the plaintiff's oil to be an oil of a brownish tinge, and of disagreeable odor, when it was neither, and special damage resulted, I am far from saying it would not be a libel."

In Mellin *v.* White L. R. [1895] App. Ca. 154, the defendant, White, proprietor of Vance's Food, when retailing packages of Mellin's Infant Food, was accustomed to paste on the following label: "Notice—The public are recommended to try Dr. Vance's Prepared Food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered." A sufficient reason for deciding the case in favor of the defendant was the fact that no actual damage had been either alleged

Would a stranger, a non-rival, be held liable for disparagement by comparison in a case where a rival would be exonerated? Suppose that X says that the goods in A's store are inferior to the

or proved. But some of the Law Lords thought that the above statement could not be regarded as a disparagement of which the law would take cognizance, even if damage had resulted. See p. 164-166.

In Nonpareil Cork Mfg. Co. *v.* Keasbey & Mattison Co. (1901) 108 Fed. 721, 723, the court gave judgment for defendant on demurrer to the declaration; Dallas, *J.*, saying, "that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor." But it would seem that the declaration alleged statements of some specific and positive defects.

In Hubbuck *v.* Wilkinson L. R. [1899] 1 Q. B. 86, 91, the court said, "that the defendant's circular when attentively read comes to no more than a statement that the defendant's white zinc is equal to, and, indeed, somewhat better, than the plaintiffs'." But compare George *v.* Blow (1899) 20 New South Wales 295; and Liebig's Extract of Meat Co. *v.* Anderson (1886) 55 Law Times 206; both stated in a later part of this note.

Some instances where disparaging statements by rivals were regarded as not confined to mere comparison, but as stating positive defects:

Plaintiff and defendant are photographers; each professing to prepare photographs by "the rococo process." Defendant publishes a statement: "We are the only photographers supplying the rococo—as it is our own production." Held, actionable disparagement if untrue in fact and producing damage. It amounts to saying that the article supplied by plaintiff and by all other persons "is spurious and not that which it purports to be." George *v.* Blow (1899) 20 New South Wales 395.

After a decision in the House of Lords, that it is open to all members of the public to sell an article as "Baron Liebig's Extract of Meat," Anderson sold it in wrappers stating: "This is the only Genuine Brand." "See favorable decision of House of Lords." An injunction was granted against Anderson. His publication that his is the "only genuine" amounts to saying that what the plaintiff puts forward is not "the genuine". Liebig's Extract of Meat Co. *v.* Anderson (1886) 55 Law Times 206.

In Lyne *v.* Nicholls (1906) 23 Times Law Reports 86, plaintiff and defendant were owners of newspapers circulating in the same locality. Defendant published an untrue statement: that "the circulation" of his newspaper "is 20 to 1 of any other weekly paper" in the district; and that "where others count by the dozen we count by the hundred." Held, a disparagement of plaintiff's newspaper which would be actionable on proof of actual damage. (Plaintiff failed because no damage was proved.) Swinfen Eady, *J.*, said, p. 88: that the statements were not "mere puffs"; but were "definite statements of fact." See Bower, Actionable Misrepresentation, 61 § 51.

The decision on a demurrer in Western Counties Manure Co. *v.* Lawes Chemical Manure Co. (1874) L. R. 9 Exch. 218, has been criticized; and in Clerk & Lindsell, Torts (2nd ed.) 553, it is said that the decision "probably is not law." But we are inclined to agree with Mr. Odgers, that while the statement of a general rule by Baron Bramwell may be too wide, yet the decision in favor of the plaintiff on the facts there alleged "is still good law." Odgers (5th ed.) 90-91. It was alleged that defendant stated (*inter alia*) that the plaintiff's guano "appears to contain a considerable quantity of coprolites, . . ." This was a specific statement of a positive defect.

In Alcott *v.* Millar's etc. Forests (1904) 21 Times Law Reports 30, the parties were rival importers of wood for street paving. The kind of wood imported and sold by plaintiff was known as American Red Gum Blocks. Defendants stated that certain roadways which had been paved with American Red Gum Blocks only from six to eighteen months "are now in rotten condition." Held, actionable disparagement, if untrue, malicious, and resulting in special damage.

goods in B's store. If A had said it, he would not be liable. Is X *prima facie* liable?

We know of no decision directly in point; although the possibility of a distinction between the two cases has been suggested.[54] The reasons given for not holding a rival for such talk are hardly of equal force in the case of a stranger. The latter's talk is not regarded as being a mere matter of course. More attention would be likely to be paid to it. In an action for deceit, a third party, a stranger to a sale, has been held liable for making untrue statements to a purchaser, when the same court would have held that similar statements if made by the vendor himself were not actionable.[55]

Would either a rival or a non-rival (a stranger) be held liable for disparagement expressed in very general terms but without any pretense of comparison? *E. g.*, X, a rival of B, and Y, a stranger, each say, that the goods in B's store "are of very poor quality." The reasons for non-liability in cases of mere comparison do not fully apply here. The statement that the goods of B are inferior to the goods of X may be consistent with the supposition that B's goods are nevertheless of good quality and fit to be purchased.[56] But in the above question we are dealing with positive disparagement, though expressed in very general terms. It is here affirmed that B's goods are absolutely poor, and not merely relatively inferior. It is conceivable that a statement, though disparaging, may be of such an extremely vague and general nature that little importance would attach to it, and damage would be unlikely to result. But, apart from such cases, no reason is perceived why general disparagement, either by a rival or by a stranger, should not give rise to an action, provided of course that the other essential elements are present.

Is proof of actual wrong motive (often termed "actual malice"), essential to make out a *prima facie* case for disparagement of the quality of property?[57]

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[54]See Lord Herschell, in White *v.* Mellin L. R. (1895) App. Ca. 154, 164; Lindley, *M. R.*, in Hubbuck *v.* Wilkinson L. R. (1899) 1 Q. B. 86, 94.

[55]Medbury *v.* Watson (1843) 6 Metc. 246, 260-261.

[56]See Wightman, *J.*, in Young *v.* Macrae (1862) 3 B. & S. 264, 270, quoted in an earlier note.

[57]As to what would constitute "actual malice" or "actual wrong motive," *if proof of either is to be held essential:*

In Mellin *v.* White, in the Court of Appeal L. R. [1894] 3 Chan. 276, 281, Lopes, *L. J.*, said it was actionable "to publish maliciously, and without lawful occasion, a false statement disparaging the goods of another person,

We think that such proof is not essential.

Assuming that the plaintiff has proved:

1. The making of the disparaging statement;

2. Its untruth;

3. Actual damage caused thereby,

We think that he has then a *prima facie* case without proving in addition—

Either 1. Defendant's intent to cause damage; or

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and causing such other person damage . . ." In the House of Lords L. R. (1895) App. Ca. 154, 160-161, Lord Chancellor Herschell, discussing the meaning of "maliciously" as used by Lopes, *L. J.*, said: "By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bona fide* merely to sell his own goods, or at all events, that he published it with a knowledge of its falsity. One or other of these elements, it seems to me, must be intended by the addition of the word 'maliciously.' Both these are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to show that he did not believe that his food was better than any other."

As to an action by a competitor against his rival for disparagement of quality: ". . . malice in this context, so far as it refers to the motive with which the defendant acted, means spite, a desire to injure the plaintiff as an end in itself, and does not include a desire to benefit the defendant at the plaintiff's expense. A desire to draw away the plaintiff's customers is in itself perfectly legitimate. It is only when improper means are employed to gain that end that such a motive becomes malicious. And the only means which for this purpose the law will regard as improper is fraud, that is to say, the making of the false statement with a knowledge of its falsity. If one man publishes from a motive of pure spite a disparaging statement with regard to another's goods, presumably an action will lie if it turn out to be untrue, even though he did not know it to be untrue. On the other hand, if the defendant did not act from spite, but from a desire to benefit himself, it will be essential to show that he knew his statement to be false. . . . In point of fact however a trader, in disparaging his rival's goods, never acts from spite, but always with the object of benefiting himself. It seems, therefore, that in an action against a trader for slander of that kind it is practically essential to prove his knowledge of the falsity. . . ." Clerk & Lindsell, Torts (2nd ed.) 552.

"The mere fact that the plaintiff and the defendant are rivals in the same line of business is by itself no evidence of malice; indeed, it rather tends to negative malice; as it renders it probable that the words were published with the object of promoting the defendant's own trade and not of injuring the plaintiff." Odgers, Libel and Slander (5th ed.) 94.

So Collins, *M. R.*, in an action for disparagement of title, said: "It was not malice if the object of the writer was to push his own business, though at the same time it might incidentally injure another person's business. To make the act malicious it must be done with the direct object of injuring that other person's business. Therefore, the mere fact that it would injure another person's business was no evidence of malice." Dunlop Pneumatic Tyre Co. *v.* Maison Talbot (1904) 20 Times L. Rep. 579, 581.

The above is thus paraphrased by Mr. Bower: ". . . it is immaterial that the *effect* may be to injure the plaintiff's business, if the only *object* of the defendant was to push his own business; the *motive* to injure must be shown." Bower, Code of the Law of Actionable Defamation, 246, note (*f*).

2. Defendant's motive of personal hostility to plaintiff; or
3. Defendant's non-belief in his statement; or
4. Defendant's bad faith of any kind.

Many of the reasons which we have heretofore given for similar views as to disparagement of title apply to this subject also. It is true that the title to tangible objects of property is generally a matter of more consequence than the qualities of the object; and that disparagement of title is more likely to cause a serious loss than disparagement of quality. But it is also true that disparagement of quality is very apt to cause damage. And there seems no injustice in holding that one who indulges in such disparagement, when not acting in the exercise of any duty or privilege, should run the risk that his statement may turn out to be untrue in fact, and to be productive of damage. He should, therefore, at his peril, have accurate knowledge; or else refrain from talking on the subject.

Language to be found in text-books and in judicial opinions seemingly affirming the necessity of proving "malice," may often be accounted for by the fact that "malice" there spoken of is a mere legal fiction. As heretofore explained, it is "malice in law"; "implied malice," as distinguished from "malice in fact."[58] We have found no well considered decision which justifies, on principle, the necessity of proving "actual malice" (or better, actual wrong motive) in order to make out a *prima facie* case of disparagement of quality.

Recent decisions, in which the necessity of proving malice was discussed, are summarized in the note below. They show a conflict of judicial opinion; but no thorough consideration of the question.[59]

[58]The ambiguous word "implied" in this connection generally denotes malice (or wrong motive) existing solely by fiction of law; *i. e.* not existing at all. But it may sometimes denote wrong motive or malice "in fact," whose existence is proved by "indirect evidence;" *i. e.*, by proof of circumstances from which the inference of the actual existence of malice or wrong motive can be drawn. It is in the first sense that the term "implied" is here used.

[59]In the same year, 1907, cases were decided in England and in Manitoba, in each of which the plaintiff alleged that a defendant newspaper proprietor had published a statement that the plaintiff's house was haunted, with the result that the house was rendered unrentable or unsaleable. Barrett *v.* Associated Newspapers (1907) 23 Times L. Rep. 666; Nagy *v.* Manitoba Free Press Co. (1907) 16 Manitoba 619, affirmed in 39 Canada Supreme Court 340.

The English case was decided for defendant, on the ground that plaintiff had failed to prove that any actual damage had resulted from the defendant's publication. Cozens-Hardy, *M. R.*, said that it was "not necessary to consider the more difficult question of malice;" but intimated his

Our conclusion is, that proof of knowledge of falsity or wrong motive is not essential to *prima facie* liability in an action for disparagement of quality where the defendant is a stranger.

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"impression" that, even if actual damage had been proved to have resulted from the defendant's publication, it would also have been necessary for the plaintiff to show malice.

In the other case, a majority of the Manitoba Court and also of the Supreme Court of Canada concurred in rendering judgment for the plaintiff; but three different sets of reasons were given for this conclusion. In the Manitoba Court the two majority judges agreed that it was not necessary to prove actual malice. Richards, *J. A.*, based his decision for the plaintiff on the ground that it must be assumed that defendant knew the statement to be untrue. Phippen, *J. A.*, held (as we undersand his opinion) that if the publication was untrue in fact and caused damage, then the defendant was liable, irrespective of knowledge of falsity or wrong motive. A majority of the Supreme Court of Canada professed to hold that "malice" was essential. They defined malice as meaning here absence of good faith; and said that proof of publishing recklessly without regard to consequences established the absence of good faith, and thus justified the assumption of the existence of malice. Davies, *J.*, said p. 349: "Actual malice in the sense of a predetermined intention to injure plaintiff in his property cannot be necessary to be proved." The head note in 39 Canada Sup. Court 340 is, in part, as follows: "The reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages from depreciation in the value of the property . . ."

Bruce *v.* J. M. Smith, Limited (1898) 1 Scotch Sess. Ca. (Fifth Series) 327, was an action against the proprietor of a newspaper for damage alleged to have been caused by a publication in a newspaper, stating that plaintiff's new building showed rents and signs of weakness and was not unlikely to collapse. The pursuer, who in his declaration had averred malice, submitted an issue in which malice was not inserted; the issue merely asking the question whether the defendant published the article to the loss of the pursuer. Lord Kincairney held, that the case might be tried on the issue proposed. Lord Kincairney, p. 332, note: "The pursuer avers malice, and I have felt much difficulty as to whether, in this particular case, it is not necessary for the pursuer to undertake the burden of proving malice or recklessness. But to insist on the insertion of malice or recklessness would be a novelty for which there is no precedent. According to our practice, the question as to the insertion of malice has always been held to depend solely on the position of the defender, and here it is clear that the defenders have no privilege. But it is also in accordance with our practice to allow, and to insist on, proof of malice by a pursuer, although malice is not in the issue, where the proof discloses privilege, and, in this case, I think the question may be left for discussion at the trial. It has been very often said, whether with absolute accuracy or not, that, in ordinary actions for defamation, malice is always presumed, except where there is a privilege. It is not quite clear whether there is such a presumption in a case of slander of property or whether such a presumption is necessary."

The Court of Session, saying nothing about malice, virtually sustained Lord Kincairney. They amended the issue so as to read (publication being admitted): "whether the said paragraph was false and calumnious, to the loss, injury, and damage of the pursuer."

George *v.* Blow (1899) 20 New South Wales 395, was an action for disparaging plaintiff's process of producing photographs by "the rococo process," by "falsely and maliciously" publishing the following statement: "We" (the defendants) "are the only photographers supplying the rococo, as it is our own production." This was construed as asserting that the article supplied by plaintiff "is spurious and not that which it purports to

Is such proof essential where the defendant is a rival? Is a competing trader, who points out alleged positive defects in the quality of his rival's goods, to be regarded as speaking on a *prima facie* privileged occasion (as occupying a *prima facie* privileged position); and hence not liable unless plaintiff proves want of belief or wrong motive on defendant's part?

We think that he is not, merely on the ground of rivalry, entitled to set up the defence of privilege.[60]

We have seen that in cases of disparagement by comparison a rival may escape liability; but his exoneration does not stand on the ground of privilege. If it did, the privilege could be destroyed, and the defendant made liable, by proving his knowledge of falsity or his wrong motive; yet it is generally agreed that proof of these facts will not alter the result. In the case of *comparative* disparagement by a rival, the courts say that there has been no *prima facie* actionable disparagement; no statement that the law takes any cognizance of; nothing requiring the defence of justification or excuse on the ground of privilege. Because the defendant is a rival, his mere *comparison* is regarded as not likely to affect the conduct of his hearers. But when the same rival alleges *positive* defects, then (if the elements of untruth and damage are present) there is a *prima facie* tort to be justified or excused; and his position as a rival does not entitle him to claim any special protection or privilege at the hands of the law.

Again we have seen that in actions for disparagement of title a rival claimant occupies a better position than a stranger; that he is regarded as speaking on a *prima facie* privileged occasion; and that the burden is upon the plaintiff to prove facts which will rebut the so-called privilege.

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be." Darley, *C. J.*, when over-ruling a demurrer to the declaration, in enumerating the elements necessary to maintain such an action (p. 399), does not name "malice." He gives as the three necessary elements: "that the plaintiff's goods are disparaged"; "that the disparagement is untrue"; "special damage arising from the false disparagement."

[60]The opinion of Fletcher, *J.*, in Swan *v.* Tappan (Mass. 1849) 5 Cush. 104, 111, may, perhaps, be cited as opposed to this view. The action was for disparagement of quality. The report does not explicitly state that defendant was a business competitor of plaintiff. But, in view of facts given, one cannot help supposing that the court understood defendant to be the publisher of a rival series of school books; and that it was upon this hypothesis that Fletcher, *J.*, said, that "if the defendant can show . . . . that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication, such proof would . . . . . bring the publication within the class of privileged publications. . . . ." If this was the ground upon which that able judge based his opinion, then we should respectfully differ.

But the case of a rival claimant of title differs from that of a competitor for trade who disparages the quality of his rival's goods. There is a difference as to the nature of the interest which the former desires to protect, and also as to the reasonable necessity of resorting to disparagement as a means of advancing his interest. His proprietary interests are at stake.[61] His silence may involve the loss of title (in effect the loss of the entire property). If he fails to assert his own title (thereby disparaging that of his rival), his omission may estop him from thereafter asserting the right which he believes that he has in the property; or, if it does not actually work an estoppel, it will be weighty evidence against him in subsequent litigation over the title.[62]

But, on the other hand, a competing trader's omission to disparage the quality of his rival's goods does not involve the loss of his title to his own goods. By disparaging the quality of his rival's goods he may be enabled to sell his own goods to better advantage. But the possibility of his enjoying this benefit does not furnish a sufficient reason why the law should confer upon him *prima facie* protection in uttering disparaging statements, which turn out to be untrue in fact and which cause damage. Take a somewhat analogous case in actions for defamation of reputation. Suppose a trader says that his rival is dishonest in his business methods and is insolvent. If the charge turns out to be untrue, can the speaker say that it was *prima facie* privileged on account of its tendency to promote his own interest; can he claim that it falls within the legitimate limits of self protection?

(THE END.)

JEREMIAH SMITH.

CAMBRIDGE, MASS.

[61]Mr. Bowen, afterwards Lord Bowen, in arguing a case of alleged disparagement of quality, said: "The cases of 'slander of title' are not analogous to the present case, for in them the plaintiff's proprietary rights are affected." Argument in Western Counties Manure Co. *v.* Lawes Chemical Manure Co. (1874) L. R. 9 Exch. 218, 220.

[62]See ante 13 COLUMBIA LAW REVIEW 32, quotation from Woodruff, *J.*